

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>KAREN S. SMITH</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,027,164
<b>ROSE ANN EBERLY and WILLIAM E. MANROSE</b>	)	
<b>(deceased) d/b/a BAVARIAN INN</b>	)	
Respondent	)	
AND	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Both William E. Manrose, who is now deceased, and the Workers Compensation Fund appealed the May 1, 2008, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on November 5, 2008, in Topeka, Kansas.<sup>1</sup>

**APPEARANCES**

Frank D. Taff of Topeka, Kansas, appeared for Rose Ann Eberly, and John A. Bausch of Topeka, Kansas, appeared for the Workers Compensation Fund (Fund). Paul D. Post of Topeka, Kansas, who represented claimant throughout this claim, did not appear before the Board for oral argument nor did Ronald J. Laskowski of Topeka, Kansas, who represented William E. Manrose, deceased.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award.

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<sup>1</sup> The parties first appeared before the Workers Compensation Board for oral argument on July 18, 2008, but the hearing was continued as the parties wished to consider substituting parties due to the deaths of both William E. Manrose and Kenneth Eberly during the pendency of this claim and to consider adding another party. Paul D. Post appeared for claimant, Frank D. Taff appeared for Rose Ann Eberly, John A. Bausch appeared for the Fund, and Ronald J. Laskowski appeared for the deceased William E. Manrose.

**ISSUES**

This is a claim for a July 9, 2005, accident and resulting injuries to the low back that claimant allegedly sustained while working at a tavern named the Bavarian Inn. In the May 1, 2008, Award, Judge Avery made the following findings:

1. Claimant sustained personal injury by accident arising out of and in the course of employment with respondent.
2. Claimant's average weekly wage was \$470.96.
3. Respondent had a payroll of at least \$20,000, thereby bringing it under the provisions of the Workers Compensation Act.
4. Claimant sustained a five percent whole person functional impairment and, based upon a 44 percent wage loss and a 15 percent task loss, a 29.5 percent work disability.<sup>2</sup>
5. Claimant was entitled to future medical treatment upon application and review.

During litigation, there were issues concerning whether the Bavarian Inn was a separate legal entity and, if not, the identity of claimant's employer. But the Judge did not list those in the Award as issues to be decided nor did the Judge specifically address them in the Award. On page 2 of the Award, the Judge indicated there were two owners of the Bavarian Inn at the time of the accident, which was probably a reference to William E. Manrose and Kenneth Eberly, but the Judge did not specify who those two individuals were. But on page 4 of the Award, the Judge wrote that Dr. Geist examined claimant on behalf of owner Rose Ann Eberly. Ms. Eberly became the sole owner of the business in January 2006, when she purchased Mr. Manrose's interest. Therefore, it is not clear from the Award if the Judge intended to find Ms. Eberly was an owner of the Bavarian Inn when the accident occurred or merely the tavern's owner in September 2006 when the doctor examined claimant.

Despite Mr. Manrose's death in April 2008, Mr. Laskowski appealed the May 1, 2008, Award on Mr. Manrose's behalf. Mr. Laskowski raised the following issues for Board review: (1) whether claimant sustained personal injury by accident arising out of and in the course of her employment with respondent, (2) claimant's average weekly wage,

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<sup>2</sup> A permanent partial disability under K.S.A. 44-510e greater than the whole person functional impairment rating.

(3) whether the parties came under the Workers Compensation Act, (4) the nature and extent of claimant's injuries and disability, and (5) future medical benefits.

The Fund also appealed the May 1, 2008, Award to the Board and raised the following issues: (1) whether claimant sustained personal injury by accident arising out of and in the course of her employment with respondent, (2) whether the employer had an annual payroll of \$20,000 so as to bring claimant's accident under the Workers Compensation Act, (3) whether claimant or the Fund had the burden of proving the employer was unable to pay benefits, (4) claimant's average weekly wage, and (5) the nature and extent of claimant's disability.

Rose Ann Eberly did not appeal the May 1, 2008, Award. But Ms. Eberly argued in her brief to this Board that she should be dismissed from the claim because she was not claimant's employer or an owner of the tavern on the date of accident. Ms. Eberly argued she was only the bookkeeper at the time of claimant's accident as the business was owned and operated in partnership between her now deceased husband, Kenneth Eberly, and Mr. Manrose. Moreover, she argued that Stephen Sachs should be considered claimant's employer on the date of accident as he allegedly held the tavern's beer and food licenses on the date of accident. Ms. Eberly also maintained that claimant's accident was not compensable under the Workers Compensation Act because the business did not have a payroll that met the statutorily required \$20,000 threshold. Finally, Ms. Eberly argued Judge Avery incorrectly calculated claimant's overtime compensation as her overtime should allegedly be based upon those hours exceeding 46 hours per week and that claimant was not entitled to receive benefits for a work disability.

Conversely, in her brief to the Board, claimant argued she sustained personal injury by accident arising out of and in the course of her employment with respondent when she fell through an opening left by a trap door in the floor of the tavern. She also argued the business had a payroll in excess of \$20,000 when including the wages of the individuals whom Ms. Eberly has argued are independent contractors. Further, claimant maintained the Fund should pay her workers compensation benefits as the tavern did not have workers compensation insurance and it was financially unable to pay her benefits.

In addition, claimant also argued her average weekly wage was \$433.17 and argued her whole person functional impairment was either five percent as determined by Dr. Peter V. Bieri utilizing the Diagnosis-Related Estimates Model of the *AMA Guides*<sup>3</sup> or a 10 percent impairment as allegedly determined by Dr. Dick Geis utilizing the Range of Motion Model of the *AMA Guides*. Finally, claimant argued she had a 17.6 percent task loss

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<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

(rather than the 15 percent task loss found by Judge Avery) and a 39.4 percent wage loss, which yield a 28.5 percent work disability.

But on October 23, 2008, claimant settled this workers compensation claim. Through her attorney, Rose Ann Eberly appeared at the settlement hearing and asserted that she was not claimant's employer on the date of accident as the tavern was being operated as a partnership between Kenneth Eberly and William E. Manrose.<sup>4</sup> Accordingly, Ms. Eberly objected to the settlement if it would subject her to any type of claim by the Fund. Ms. Eberly also stated she was disputing that the tavern's payroll was sufficient to bring the parties under the Workers Compensation Act. The terms of the settlement were approved by Special Administrative Law Judge Jerry Shelor with claimant to receive a lump sum payment from the Fund of \$24,000 in full satisfaction of her claim. The Fund also agreed to pay all authorized medical expense that had been incurred through the date of the settlement hearing. Moreover, the settlement provided that any issues between the Fund and Ms. Eberly were specifically reserved.

On December 4, 2008, a Nunc Pro Tunc Settlement Award was filed with the Division of Workers Compensation (Division). That document generally states: (1) it was in claimant's best interest to approve the \$24,000 settlement offered by the Fund, (2) the settlement was a compromise and a full and final settlement of the May 1, 2008, Award, and that it constituted a release of all claims of the claimant against the respondents, their heirs, executors and administrators, (3) the issues between the Fund and the respondents were reserved, and (4) the Fund agreed to pay all valid and authorized medical expense incurred through the date of the settlement hearing, October 23, 2008. The document bears the lone signature of Special Administrative Law Judge Jerry Shelor and the document does not indicate that copies were provided or mailed to anyone.

At the November 5, 2008, oral argument before the Board, the Fund argued this appeal should now be dismissed as the Fund is no longer aggrieved by the May 1, 2008, Award. The Fund maintains Ms. Eberly does not have standing to pursue this appeal as she did not request Board review of the May 1, 2008, Award.

Conversely, Ms. Eberly announced at oral argument that despite claimant's settlement she wants the Board to address the following issues: (1) was Stephen Sachs claimant's employer at the time of the accident; (2) was Ms. Eberly an owner of the Bavarian Inn or claimant's employer at the time of the accident, (3) was claimant's employer(s) insolvent so as to make the Fund liable for claimant's benefits; (4) did the employer have a sufficient payroll to bring claimant's accident under the Workers

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<sup>4</sup> Mr. Eberly died September 28, 2005, and Mr. Manrose died April 14, 2008.

Compensation Act; and (5) did the Judge correctly compute claimant's overtime and average weekly wage.

As indicated above, Mr. Laskowski did not appear at oral argument. Instead, on November 5, 2008, Mr. Laskowski filed with the Division a document entitled Agreed Order of Dismissal that was signed by all the attorneys, except Ms. Eberly's attorney (Mr. Taff). That document would purportedly dismiss Mr. Manrose, deceased, from this claim.

The issues that have been raised on this appeal are:

1. Should the Board address the issues raised by Rose Ann Eberly when claimant has settled this workers compensation claim and the issues raised by Ms. Eberly generally comprise defenses that Ms. Eberly might raise should the Fund request reimbursement from Ms. Eberly in a future proceeding?
2. Should this appeal be dismissed because Ms. Eberly did not appeal the May 1, 2008, Award, and the Fund and Mr. Manrose, deceased, are no longer aggrieved by the Award?
3. Who was the employer on the date of accident and did that employer have a sufficient payroll to bring claimant's accident under the Workers Compensation Act?
4. What is claimant's average weekly wage?
5. What is the nature and extent of claimant's disability?
6. Is the Fund responsible for paying claimant's benefits for the reason that the employer is unable to pay?
7. Should Ms. Eberly be dismissed from this claim?

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant worked at the Bavarian Inn tavern for a number of years before it changed hands in 2005. When the tavern changed ownership, claimant became the manager. On July 9, 2005, claimant injured her lower extremities and low back when she fell into the hole left by an opened trap door. That accident arose out of and in the course of claimant's employment.

In January 2006, claimant initiated this workers compensation claim, naming Rose Ann Eberly and William Manrose d/b/a The Bavarian Inn as the employer. In addition, the Fund was implied and made a party to the claim on the basis that the employer was allegedly without insurance and unable to pay whatever workers compensation benefits would be due claimant.

In the May 1, 2008, Award, the Judge determined claimant was entitled to receive permanent disability benefits under K.S.A. 44-510e for a 29.5 percent permanent partial general disability, or \$38,441.80. The Fund appealed the Award to the Board. Mr. Laskowski also filed an appeal on behalf of Mr. Manrose, who was then deceased. Rose Ann Eberly did not appeal.

Both Kenneth Eberly and William E. Manrose, who died before the May 2008 Award was issued, held some type of ownership interest in the tavern. The record does not indicate whether a proceeding was filed or needed for Mr. Manrose's estate when he died in April 2008. On the other hand, Rose Ann Eberly, who is Kenneth Eberly's widow, testified there was no estate to probate when her husband died in September 2005. There is nothing in the record to establish how Kenneth Eberly's interest in the tavern passed to his widow, who in January 2006 purchased Mr. Manrose's interest in the business and then in September 2007 sold the business for \$90,000.

On October 23, 2008, claimant settled this claim for a \$24,000 lump sum payment from the Fund, which was significantly less than the permanent partial disability benefits that she was granted in the May 1, 2008, Award. A Nunc Pro Tunc Settlement Award was filed with the Division on December 4, 2008. That document generally states: (1) it was in claimant's best interest to approve the \$24,000 settlement offered by the Fund, (2) the settlement was a compromise and a full and final settlement of the May 1, 2008, Award, and that it constituted a release of all claims of the claimant against the respondents, their heirs, executors and administrators, (3) the issues between the Fund and the respondents were reserved, and (4) the Fund agreed to pay all valid and authorized medical expense incurred through the date of the settlement hearing, October 23, 2008. In short, it appears the Nunc Pro Tunc Settlement Award clarified that claimant was terminating her claim in all respects and giving up her right to request any additional benefits.

#### **CONCLUSIONS OF LAW**

Claimant has settled and terminated her workers compensation claim. Despite that settlement, however, Rose Ann Eberly requests the Board to decide the issues that she has raised in this appeal. In summary, Ms. Eberly argues the Judge erred when he referred to her as being an owner of the tavern. Instead, she contends her now deceased husband, Kenneth Eberly, and his friend, William E. Manrose, owned and operated the

tavern as partners on the date of claimant's accident and, therefore, those two were claimant's employer on the date of accident.

Ms. Eberly also argues, in essence, that the Fund should not have paid claimant any benefits because the tavern did not have a sufficient payroll. In the alternative, she argues the Fund had no liability in this claim as Mr. Manrose possessed sufficient assets before his death to pay claimant's benefits. Ms. Eberly also argues that Stephen Sachs should be considered claimant's employer as he possessed the food and beer license for the tavern. Finally, Ms. Eberly challenges the manner the Judge computed claimant's overtime and, thus, her average weekly wage.

The issue of whether the Board should address the issues now being raised by Ms. Eberly in light of claimant's settlement appears to be one of first impression. The Board is aware of no workers compensation statute or decision that addresses the issue.

First, the claim initiated by claimant has been extinguished by the October 2008 settlement and November 2008 Nunc Pro Tunc Settlement Award. Accordingly, the issues raised by Ms. Eberly have no effect upon claimant's benefits and are, therefore, merely an attempt by Ms. Eberly to preclude the Fund from seeking reimbursement from her for the benefits the Fund paid to claimant. As a practical matter, the only issue that really remains regarding claimant's accident is whether the Fund should receive reimbursement for the benefits it has paid to claimant or on claimant's behalf.

Actions for reimbursement, however, must be brought in district court. K.S.A. 44-532a reads:

(a) If an employer has no insurance to secure the payment of compensation . . . and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, or such employer cannot be located and required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. . . .

(b) The commissioner of insurance, acting as administrator of the workers compensation fund, shall have a cause of action against the employer for recovery of any amounts paid from the workers compensation fund pursuant to this section. **Such action *shall* be filed in the district court of the county in which the accident occurred or where the contract of employment was entered into.** (Emphasis added.)

Due to the settlement, the question of whether Ms. Eberly was claimant's employer on the date of accident is no longer in controversy in this proceeding, although it would be an issue in any action for reimbursement the Fund might initiate. Accordingly, at this

juncture of the claim, Ms. Eberly now seeks, in essence, a declaratory judgment or finding that she was not claimant's employer on the date of accident. The Act, however, does not specifically empower the Board to issue such a declaratory opinion.

Second, the Kansas Court of Appeals has ruled that when an injured worker's interests are not at stake, insurance carriers may not litigate their respective liabilities in the workers compensation claim unless it is otherwise expressly allowed by the Act. And that holding pertains to the issue of who the employer may be.

In *American States*<sup>5</sup>, the injured worker settled his workers compensation claim with one of two alleged employers. Like the claim now before us, one of the issues in *American States* was the identity of the employer. In the declaratory judgment action filed by one of the alleged employer's insurance carriers, the Kansas Court of Appeals held that when a worker's interests are not at stake,

unless the workers compensation act expressly allows the employers and insurance companies to litigate their relative liability in the workers compensation division, they may not.<sup>6</sup>

It is clear from *American States* that insurance carriers may not litigate employer identity issues in the Division of Workers Compensation once the injured worker's claim has been settled and extinguished. That rule is applicable to Ms. Eberly. The fact that Ms. Eberly does not have an insurance carrier representing her interests does not grant her additional rights.

Ms. Eberly stated at the oral argument before the Board that she was pursuing this appeal in order to exhaust her administrative remedies. That doctrine was also addressed in *American States*. The Kansas Court of Appeals cited *Maryland Cas. Co.*<sup>7</sup> for the proposition that only injured workers were required to exhaust their administrative remedies to recover compensation before turning to the courts. The Kansas Court of Appeals wrote, in part:

Hanover also argues American's suit is precluded because American failed to exhaust administrative remedies as required by K.S.A. 77-612. This argument was expressly rejected by the Kansas Supreme Court in *Maryland Cas. Co.* as **the requirement to exhaust administrative remedies was interpreted to apply only**

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<sup>5</sup> *American States Ins. Co. v. Hanover Ins. Co.*, 14 Kan. App. 2d 492, 794 P.2d 662 (1990).

<sup>6</sup> *Id.* at 500.

<sup>7</sup> *United States Fidelity & Guaranty Co. v. Maryland Cas. Co.*, 186 Kan. 637, 352 P.2d 70 (1960).



**to the claimant's attempts to recover compensation.** (Citation omitted.) In the present case, Miller exhausted his remedies when he settled. (Emphasis added.)<sup>8</sup>

Likewise, at oral argument before the Board Ms. Eberly stated that the Award had identified her as an owner of the tavern. But the Board finds those concerns are misplaced. As indicated above, the Judge did not make the identity of the employer an issue to be decided in the Award. Moreover, the Award fails to identify who the employer or employers were on the date of accident. And although the Judge found that "Dr. Geist . . . examined the claimant on behalf of owner Rose Ann Eberly,"<sup>9</sup> that finding does not indicate that Ms. Eberly was the tavern's owner or claimant's employer on the date of accident. There is no dispute Ms. Eberly purchased Mr. Manrose's interest in January 2006 and, therefore, she held an ownership interest in the tavern in September 2006 when Dr. Geist evaluated claimant. More importantly, the Judge also found there was no evidence presented regarding the present ability of *either* former or *current* owner to pay the award in this case. There is no way to know if the "current owner" the Judge referenced was Ms. Eberly or the person or persons who purchased the tavern from Ms. Eberly in September 2007. In short, the Judge's finding and Award did not indicate Ms. Eberly was claimant's employer at the time of the July 2005 accident and, therefore, did not indicate Ms. Eberly was responsible for claimant's workers compensation benefits.

Ms. Eberly also challenged the Judge's finding that the employer was not "capable of providing for the payment ordered under this award."<sup>10</sup> Ms. Eberly argued that Mr. Manrose had sufficient assets to pay claimant's benefits. The Board finds that because the employer or employers were not identified in the Award, the Judge's finding regarding the employer's financial fitness was superfluous.

Finally, as indicated above the Judge did not make the employer's identity an issue to be decided and the Judge did not make specific findings regarding the employer's identity or legal status. Accordingly, the Board sets aside any implied finding that those named in the caption were claimant's employer on the date of accident. As also indicated above, the identity of claimant's employer is an issue that may be appropriately addressed in any proceeding for reimbursement the Fund may initiate in district court under K.S.A. 44-532a.

The Board concludes this appeal should be dismissed. Because this claim has been settled and there is no express right for parties to litigate the identity of the employer

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<sup>8</sup> *American States*, 14 Kan. App. 2d at 500.

<sup>9</sup> ALJ Award (May 1, 2008) at 4.

<sup>10</sup> *Id.* at 4.

when the interests of the worker are no longer at stake, the Board declines to address those issues that Ms. Eberly now raises. Moreover, those issues may be raised by Ms. Eberly and addressed in any action for reimbursement the Fund *may* bring against her under K.S.A. 44-532a in district court.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>11</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**WHEREFORE**, the Board dismisses this appeal.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Paul D. Post, Attorney for Claimant  
Frank D. Taff, Attorney for Rose Ann Eberly  
Ronald J. Laskowski, Attorney for William E. Manrose (deceased)  
John A. Bausch, Attorney for the Fund  
Brad E. Avery, Administrative Law Judge

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<sup>11</sup> K.S.A. 2007 Supp. 44-555c(k).